UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ADECCO USA, INC.	)	
Petitioner/Cross-Respondent	)	
v.	)	**No. 16-60375**
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

RESPONSE IN PARTIAL OPPOSITION TO ADECCO'S MOTION FOR ORDER SUMMARILY GRANTING PETITION FOR REVIEW

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The National Labor Relations Board, by its Deputy Associate General Counsel, respectfully opposes in part the motion filed by Adecco USA, Inc. ("the Company") seeking an order summarily granting its petition for review of a Board Order in light of the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018).

On May 30, 2018, the Board filed a motion to remove this case from abeyance, summarily grant review and deny enforcement of the Board's Order in part, and remand to the Board the remainder of the case. The Board acknowledged that, under *Epic Systems*, the Board's finding that the Company violated the National Labor Relations Act, 29 U.S.C. § 151 et seq., by maintaining an

agreement barring employees from concertedly pursuing work-related legal claims cannot be sustained. Accordingly, the parties agree that the Court should summarily grant review and deny enforcement of that portion of the Board's Order.

In its May 30 motion, the Board also asked the Court to remand that portion of the Board's Order finding that the Company violated the NLRA by maintaining an agreement that interferes with employees' right to file unfair-labor-practice charges with the Board or otherwise access Board processes. The Company has opposed that request and moves this Court instead to grant summary review of the Board-access violation in light of *Epic Systems*. The Board maintains that, for the reasons set forth in the Board's motion for remand and as further detailed below, the Board must be given the first opportunity to determine whether or not the agreement interferes with employees' access to the Board under the Board's new standard for analyzing work rules, which it announced in *The Boeing Company*, 365 NLRB No. 154, 2017 WL 6403495 at *2 (Dec. 14, 2017), and whether *Epic Systems* impacts that analysis. The Company's arguments do not support summary reversal; to the contrary, they lend additional weight to the Board's motion to remand that portion of the case.

ARGUMENT

1. The rationale underlying the Board-access violation in this case is the Board's finding that the Company maintained an agreement that employees would "reasonably construe" as restricting their access to the Board's processes. The Board explained that its finding in that regard was based on the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for assessing whether workplace rules interfere with employees' rights under the NLRA. Because the Board overturned its "reasonably construe" standard in *Boeing*, 2017 WL 6403495 at *2, eliminating the Board's rationale, the Board requested that the Court remand that issue in this case so that the Board can address, in the first instance, whether the Company's agreement interferes with employees' access to the Board's processes under *Boeing*. The Company concedes (Co. Motion 5) that if *Epic Systems* does not resolve the question, the Board-access violation should be remanded to the Board for reconsideration in light of *Boeing.* Since the Board filed its motion, this Court has granted near-identical motions to remand to the Board orders finding Board-access violations in arbitration agreements decided under the *Lutheran-Heritage* standard, for reconsideration under the *Boeing* standard. *See Brinker Intl. Payroll Co. v. NLRB*, No. 15-60859 (June 19, 2018 Order granting Board's opposed motion to summarily grant review of Board's order finding individual-arbitration agreement unlawful, and remanding

finding that agreement interfered with filing Board charges) (Motion and Order attached); *The Neiman Marcus Group, LLC v. NLRB*, No. 15-60572 (June 11, 2018 Order granting unopposed motion); *Lincoln E. Mgmt. Corp. v. NLRB*, No. 16-60401 (June 11, 2018 Order) (same); *Gamestop Corp. v. NLRB*, No. 16-60031 (June 8, 2018 Order) (same); *Am. Express Travel v. NLRB*, No. 15-60830 (June 1, 2018 Order) (same); *see also The Rose Group, d/b/a Applebee's Rest. v. NLRB*, 3d Cir. No. 15-4092 (June 12, 2018 Order) (same). Remanding the Board-access issue in this case along with those will allow the Board to elucidate its new standard in various factual circumstances presented in the agreements under review.

2. In its motion, the Company acknowledges that employers may not restrict an employee's NLRA-protected access to the Board, and that "[i]f, in a future case, an employee actually proves that [the Company] interfered with his or her right to file [unfair-labor-practice] charges, the Board (and this Court) can take appropriate action to remedy the resulting damage." (Co. Motion 9.) Its argument for summary grant of its petition for review in lieu of remand rests on its assertion that the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("FAA"), as interpreted in *Epic Systems*: (1) invalidates a portion of the analysis in the Board's decision, and (2) precludes certain of the remedies the Board ordered. As discussed below, the Court does not have jurisdiction to entertain the Company's arguments, which

were not presented to the Board. In any event, neither argument supports denying remand of the portion of the order relating to the Board-access violation for further consideration and, indeed, both lend additional weight supporting remand.

a. As set forth in the Board's brief (pp. 20-21), and unchallenged in the Company's reply brief, the Company never raised to the Board the FAA arguments it presents to the Court in its motion. It argued only that the Board should not be given deference when interpreting the agreement and that the Board erred by finding, under *Lutheran Heritage*, that employees would "reasonably construe" its agreement as interfering with that right. As a result, it has waived its FAA-based argument under Section 10(e) of the NLRA, which provides that "[n]o objection that has not been urged before the Board … shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e); *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

The Supreme Court's decision in *Epic Systems* does not constitute extraordinary circumstances. With respect to the Board-access issue, it did not result in a "substantial change in controlling law," *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896 n.7 (1984), rendering the finding under review "'clearly' erroneous," *Medley v. Thaler*, 660 F.3d 833, 839 (5th Cir. 2011) (quoting *NLRB v. Robin Am. Corp.*, 667 F.2d 1170, 1171 (5th Cir. 1982)). As discussed further below (pp. 6-8),

Epic Systems did not address, much less diminish, the Board's ability to determine whether an employer has interfered with employees' access to the Board's processes. While the Company points to *Epic Systems* to argue that the Board cannot order the Company to revise its agreement because the FAA requires the enforcement of arbitration agreements "according to its terms" (Co. Motion 1, 7, 9), that proposition was established by the Supreme Court long ago. *See, e.g.*, *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). Because *Epic Systems* did not substantially change the law protecting employee access to the Board, and nothing prevented the Company from raising its argument in a timely fashion before the Board, the Court is jurisdictionally barred from considering that argument.

b. In any event, the Court in *Epic Systems* was not presented with the question of whether the FAA precludes the Board from finding that an arbitration agreement unlawfully interferes with employees' access to the Board's processes. The Board-access violation presents different issues from the violation that was before the Supreme Court, which invalidated an arbitration agreement based on the agreement's concerted-action waiver. In *Murphy Oil*, this Court upheld the Board's finding that employees could reasonably construe the arbitration agreement to interfere with their access to the Board. In enforcing the Board's Order based on that finding, the Court explained that Section 10(a) of the NLRA,

29 U.S.C. § 160(a), empowers the Board to prevent unfair labor practices, and that power "cannot be limited by an agreement between employees and [an] employer."[1] *Murphy Oil USA Inc. v. NLRB*, 880 F.3d 1013, 1019 (2015), *aff'd on other grounds*, No. 16-307, 2018 WL 2292444 (U.S. May 21, 2018); *see also D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 363-64 (5th Cir. 2013). "Wherever private contracts conflict with [the Board's] functions, they . . . must yield or the [NLRA] would be reduced to a futility." *Murphy Oil*, 880 F.3d at 1019 (quoting *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944)). Accordingly, in *D.R. Horton*, 737 F.3d at 363-64, and again in *Murphy Oil*, 880 F.3d at 1018-19, although this Court held that an employer may, under the FAA, lawfully maintain an agreement requiring that parties pursue disputes through individual arbitration, it further held that an employer may not maintain language in an arbitration agreement that interferes with employees' access to the Board's processes. No party has sought Supreme Court review of those Board-access violations.

[1] Section 10(a) states: "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." Protecting employees unrestrained right to access the Board's processes is critical, for "[i]mplementation of the [NLRA] is dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing un unfair labor practice charge." *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 238 (1967); *see also id.* at 238 n.3 ("Although [Section] 10(a) of the [NLRA] empowers the Board to prevent unfair labor practices . . . [Section] 10(b)[, 29 U.S.C. § 160(b),] conditions the exercise of that power on the filing of charges; the Board cannot initiate its own processes").

c. The Company first bases its argument that *Epic Systems* mandates summary reversal of the Board-access violation (Co. Motion 3-4) on language in the Board's Decision and Order stating that employees would reasonably construe the agreement as interfering with the Board's processes because it required that employees bring claims "only in their individual capacity." (ROA. 110-11.) The Company views this as another attack on the class-action waiver, which *Epic Systems* held to be lawful. (Co. Motion 3.) But the language the Company points to was only one element of the agreement that the Board considered in finding that the agreement, reasonably construed, unlawfully interferes with employees' access to the Board. It primarily relied on the agreement's broad requirement that the parties arbitrate "any and all disputes, claims or controversies." (ROA 110-11; 28-29.) Moreover, the Board found the "individual capacity" language relevant primarily because it would be understood as *further* interfering with employees' access to the Board, i.e., that "even if an employee could determine from the [a]greement that he could invoke the Board's processes," the waiver might lead the employee to believe he was precluded from filing collective Board charges. (ROA 111.) To the extent the Board considered that language in finding that the agreement would reasonably lead employees to believe they could not access Board processes (ROA 111), that further supports remand so that the Board may reconsider its analysis both under its new *Boeing* standard and in light of *Epic*

System's discussion of class waivers in arbitration agreements. It would be premature for the Court to address that argument before allowing the Board to determine, under its standard announced in *Boeing*, whether the Company's agreement interferes with employees' access to the Board.

d. Finally, the Company opposes remand based on its contention that, under the FAA, the Board lacks authority to order that an employer remedy an access violation by revising an arbitration agreement. Even if that were correct, it would not affect the threshold determination of whether a violation occurred, or preclude the Board, if a violation is found, from remedying it in some other manner, such as through posting a remedial notice. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002) (explaining that while Board lacked authority to remedy order backpay for unlawfully discharged employees who lacked documentation to work in country, that "does not mean that the employer gets off scot-free"; Board may still order employer to cease and desist from its violations and to post a notice informing employees of their rights and detailing the employer's violations). Remand would therefore also allow the Board to assess the appropriate remedy in the event that it finds a violation under *Boeing*.

3. In sum, the Board's request for a remand of the portion of its order relating to the Board-access violation is not, as the Company contends (Co.

Motion 8) a "clever end-around" *Epic Systems*. Remand is not a covert effort to invalidate the class waiver in the Company's agreement, or impose any particular remedy. Instead, it seeks to allow the Board to assess the Company's agreement, along with the agreements at issue in the remanded cases discussed above, under its new work-rule framework, at which point the Company, if it is aggrieved, can choose whether to seek review.

WHEREFORE, the Board respectfully requests that the Court deny the Company's motion and grant the Board's motion asking the Court to summarily grant review and deny enforcement of that portion of the Board's Order directly governed by the Supreme Court's decision in *Epic Systems*, and sever and remand to the Board the remainder of the case.

Respectfully submitted,

/s Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dated at Washington, D.C.
this 20th day of June 2018

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ADECCO USA, INC.	)	
Petitioner/Cross-Respondent	)	
v.	)	**Nos. 16-60375**
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 2,281 words of proportionally spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben
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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.	)	
Petitioner	)	
v.	)	No. 16-60859
NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	

MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO REMOVE THIS CASE FROM ABEYANCE, SUMMARILY GRANT THE COMPANY'S PETITION FOR REVIEW IN PART AND REMAND TO THE BOARD THE REMAINDER OF THE CASE

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The National Labor Relations Board, by its Deputy Associate General Counsel, respectfully moves this Court to remove this case from abeyance, summarily grant review of that portion of the Board's Order governed by the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018), and remand to the Board the remainder of the case.

1. In the Decision and Order under review, the Board found that Brinker International Payroll Company ("the Company") violated the National Labor Relations Act by maintaining an agreement barring employees from concertedly

pursuing work-related claims in any forum, arbitral or judicial. *Brinker International Payroll Co.*, 363 NLRB 54, slip op. at 1 (2015). In doing so, the Board applied the rule set forth in *Murphy Oil, USA, Inc.*, 361 NLRB 774 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, No. 16-307 (Jan. 13, 2017).

The Board separately found, under its analytical framework laid out in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that the Company violated the Act by maintaining an arbitration agreement that employees would reasonably construe as restricting their right to file unfair-labor-practice charges with the Board. *Brinker International Payroll Co.*, 363 NLRB 54, slip op. at 1 (2015).

2. On September 19, 2016, this Court placed this case in abeyance pending the Supreme Court's decision in *NLRB v. Murphy Oil, USA, Inc.*, No. 16-307, *Lewis v. Epic Sys. Corp.*, No. 16- 285; and *Morris v. Ernst & Young, LLP*, No. 16-300.

3. On May 21, 2018, the Supreme Court issued its decision in *Epic Systems*, holding that employers may lawfully maintain arbitration agreements that bar employees from concertedly pursuing work-related legal claims.[1] The Board acknowledges that under that decision, the Board's finding that the Company

[1] The Court issued *Epic Systems* together with *Murphy Oil*, No. 16-307, and *Ernst & Young LLP* v. *Morris*, No. 16-300.

unlawfully maintained the Agreement is not enforceable, and the Board is willing to submit to partial summary grant of review of the relevant portion of its Order.

4. On December 14, 2017, the Board issued *The Boeing Company*, which "overrule[d] the *Lutheran Heritage* 'reasonably construe' standard" and announced a new test to replace it. 365 NLRB No. 154, 2017 WL 6403495 at *2 (Dec. 14, 2017). *Boeing*'s rejection of the "reasonably construe" standard eliminates the Board's rationale for its finding at issue here that the Company's agreement restricts employees' right to file unfair-labor-practice charges with the Board. The issue of whether the agreement restricts that right under *Boeing*'s framework is a question for the Board to answer in the first instance. Accordingly, the Board respectfully moves this Court to sever and remand that issue to the Board.

5. Counsel for the Company does not consent to this motion.

WHEREFORE, the Board respectfully requests that the Court remove this case from abeyance, summarily grant review of that portion of the Board's Order governed by the Supreme Court's decision in *Epic Systems*, and sever and remand

to the Board the remainder of the case.

Respectfully submitted,

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, S.E.
Washington, D.C. 20570

Dated at Washington, D.C.
this 4th day of June 2018

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.	)	
Petitioner	)	
v.	)	No. 16-60859
NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 601 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben
Linda Dreeben
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1015 Half Street, SE
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Dated at Washington, D.C.
this 4th day of June 2018

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.	)	
Petitioner	)	
v.	)	No. 16-60859
NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	

CERTIFICATE OF SERVICE

I certify that on June 4, 2018, the foregoing motion was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, D.C.
this 4th day of June 2018

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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June 19, 2018

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No. 15-60859 Brinker Intl Payroll Co., LP v. NLRB
Agency No. 27-CA-110765

Dear Counsel,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Rebecca L. Leto

By: _____
Rebecca L. Leto, Deputy Clerk
504-310-7703

cc w/encl:
Mr. Kelvin C. Berens
Mr. Ross Gardner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60859

BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

A True Copy
Certified order issued Jun 19, 2018

Tyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Petition for Review of an Order of
the National Labor Relations Board

Before SMITH, HAYNES, and WILLETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that respondent's opposed motion to remove from abeyance is GRANTED. Respondent's opposed motion summarily to grant the petition for review in part is GRANTED. Respondent's opposed motion to remand the remainder of the case to the Board is GRANTED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ADECCO USA, INC.	)	
Petitioner/Cross-Respondent	)	
v.	)	**Nos. 16-60375**
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I certify that on June 20, 2018, the foregoing motion was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

s/ Linda Dreeben

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